



**IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE DIVISION)**

REPORTABLE

Case number: 25519/2024

In the matter between:

TRACEY SUSAN ZURNAMER N.O.

First Applicant

(in her capacity as Trustee of the Derek Kelynack
Family Trust – T[...])

MARION CORNELIA KELYNACK N.O.

Second Applicant

(in her capacity as Trustee of the Derek Kelynack
Family Trust – T[...])

PATRICIA MERLE RIX N.O.

Third Applicant

(in her capacity as Trustee of the Jack Kelynack
Family Trust – T[...]²)

And

JA CLIFT (PTY) LTD

First Respondent

(Registration No 1939/012350/07)

**TRUSTEES FOR THE TIME BEING OF THE
JAMES CLIFT TRUST**

Second Respondent

**TRUSTEES FOR THE TIME BEING OF THE
JAMES ANDREW CLIFT TRUST**

Third Respondent

**TRUSTEES FOR THE TIME BEING OF THE
TREVOR RICHARD CLIFT TRUST**

Fourth Respondent

**TRUSTEES FOR THE TIME BEING OF THE
SECOND PETER CLIFT FAMILY TRUST**

Fifth Respondent

**TRUSTEES FOR THE TIME BEING OF THE
SECOND MIKE CLIFT TRUST**
(IT no 2[...])

Sixth Respondent

**TRUSTEES FOR THE TIME BEING OF THE
SECOND WILLIAM JOHN CLIFT TRUST**

Seventh Respondent

**TRUSTEES FOR THE TIME BEING OF THE
WILSAN TRUST**

Eighth Respondent

Coram: Pangarker J

Hearing date: 8 August 2025

Judgment delivered: 6 March 2026

Summary: *Trusts – whether locus standi established - locus standi issue addressed in supplementary replying affidavit - Trust Deed requiring minimum number of Trustees in office – Resolution to institute legal proceedings signed by one Trustee only - whether subsequent ratification by Resolution of three Trustees is a remedy where Trust suffered a lack of capacity at the relevant time*

ORDER

- a. Condonation is granted for the applicants' non-compliance with the order granted on 27 January 2025.

- b. Leave is granted for the admission of the supplementary replying affidavit dated 7 August 2025. No order as to costs.
 - c. The application is dismissed with costs, which shall include the costs of two counsel (scale C).
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JUDGMENT

PANGARKER J

Introduction

[1] JA Clift (Pty) Ltd, the company, is the first respondent in this opposed application. James Andrew Clift (also known as Bill Clift) founded the company in 1906 in Paarl and operated it as a sole proprietorship. The company was incorporated in 1939 and at the time of the application which forms the subject of this judgment, it was the oldest monumentalist and granite business in Southern Africa.

[2] The company is a family-owned business with its shares passed down by being held in certain Trusts. At its inception, the company's business was concerned with granite, which is still mined from the De Hoop Quarry on the slopes of Paarl Mountain. Recently though, the company also ventured into the production of wine, table grapes, table olives and olive oil on the De Hoop and Schoongezicht Farms.

[3] The Clift family has historically been the majority shareholders in the company and directed the company's business. The 2nd to 8th respondents constitute the Clift

family. In July 1946, Jack Kelynack was invited to become a shareholder in the company and addressed correspondence to this effect to Bill Clift.¹ Derek Kelynack, a forebear of Jack Kelynack, was a former director of the company and resigned in 1996².

The parties

[4] As for the parties to the application, the position may be summarized as follows: William Christopher Clift, a fourth generation Clift, is a director of the first respondent (company), along with his brothers, James Andrew Clift, Trevor Richard Clift and Derek Andrew Clift. He is the deponent to the respondents' answering affidavit and one of the Trustees to the 2nd William John Clift Trust (7th respondent) and the Wilsan Trust (8th respondent).

[5] The applicants refer throughout to "minorities" and "majorities", terms which the respondents disagree with as their view is that it is not entirely correct. The applicant Trusts, as represented by the cited Trustees, hold 15,94% shareholding in the company and may thus be characterized as minority shareholders. The shares are held and divided as follows:

Trust	Applicant/Respondent	% shareholding in JA Clift (Pty) Ltd
Derek Kelynack Family Trust	1 st and 2 nd applicants	3,94%
Jack Kelynack Family Trust	3 rd applicant	12%
James Clift Trust	2 nd respondent	5, 18%
James Andrew Clift Trust	3 rd respondent	1, 98%
Trevor Richard Clift Trust	4 th respondent	1,98%
Second Peter Clift Family	5 th respondent	22, 44%

¹ AA4

² JP3

Trust		
Second Mike Clift Trust	6 th respondent	26, 30%
Second William John Clift Trust	7 th respondent	22, 55%
Wilsan Trust	8 th respondent	3,65%

[6] According to the applicants, the 2nd respondent is cited due to its interest in the proceedings only, and no relief is sought against it. From the above breakdown of shares, it is evident that the 2nd to 4th and 8th respondents are also minority shareholders in the company. The 5th to 7th respondents collectively hold 71,29% of the company's shares, thus the majority shareholding.

[7] As indicated, the applicants refer to themselves as “the minorities”. Having regard to the shareholding set out in the founding affidavit, which the respondents confirm, and as summarized in the above table, the respondents' characterization is not entirely correct, as the “minorities” would also include the 2nd to 4th and 8th respondents.

The relief sought

[8] The applicants seek orders in its Notice of Motion, based on oppressive or unfairly prejudicial conduct committed by the majority shareholders/directors of the company towards them. The applicants purport to act on behalf of the Derek Kelynack and Jack Kelynack Family Trusts with a view to pursuing the respective Trusts' rights as shareholders in the company. The relief is thus premised on section 163 of the Companies Act 71 of 2008. Before turning to the various grounds advanced to support their case, it is necessary to summarize the relief/order sought in the application.

[9] The following orders, as summarized, are requested:

- 9.1 that the company and 3rd to 8th respondents are directed to purchase the applicants' shares and loan accounts in the company at a fair value to be determined³;
- 9.2 that the applicants and 3rd to 8th respondents agree upon the appointment of a practicing-chartered accountant (CA) of not less than 15 years' standing to value the shares and loan accounts as per paragraph 3 to 9 of the Notice of Motion; and to determine a purchase consideration for the applicants' loan accounts and shares;
- 9.3 the valuer is required to determine the fair value of the shares and loan accounts within 30 days of date of the order;
- 9.4 costs of the valuer shall be paid by the 3rd to 8th respondents;
- 9.5 in determining the fair value, the valuer shall act as an expert and not as an arbitrator⁴;
- 9.6 the parties are required to co-operate with the valuer and provide him with the necessary information and documentation to undertake the valuation;
- 9.7 the valuer would have specific powers⁵;
- 9.8 the parties shall be entitled to forward documents or make representations to the valuer;
- 9.9 the determination of the valuer is final and binding upon the parties;

³ To be determined in accordance with para 2-9 of the Notice of Motion

⁴ Further detail as per par 5.1 – 5.3 of Notice of Motion

⁵ The powers are set out at par 7 of Notice of Motion

- 9.10 payment of the fair value of the shares and loan account shall be made within one month of such determination being made;
- 9.11 on a full discharge of obligations by the party acquiring the shares and loan accounts, the applicants shall transfer their shares to the transferee shareholders or the company, as the case may be;
- 9.12 the respondents are directed to take all reasonable steps to procure the applicants' release from any liability under any guarantee given by them for the company's obligations, and until such guarantee is given, the 3rd to 8th respondents shall be jointly and severally liable and indemnify the applicants against such liabilities;
- 9.13 that costs are payable by the 1st and 3rd to 8th respondents on an attorney and client scale; and
- 9.14 further and/or alternative relief.

The grounds for section 163 relief

[10] The applicants' case in terms of section 163 of the Companies Act, and for the relief sought, is based on five grounds, namely: (i) that the applicants have not received the company's signed financial statements for the 2023 financial year; (ii) the majority shareholders have received undue benefit in relation to the company's properties, de Hoop Farm and Schoongezicht Homesteads, to the exclusion of the applicants; (iii) the applicants have not received dividends since 2009 due to a misappropriation of capital and profits by the company's directors and a failure to declare dividends; (iv) a failure by "the majority" to communicate and/or notify the applicants of meetings adequately and with a proper agenda(s); and, (v) the directors' failure to correspond timeously to correspondence from the applicants' accountant.

[11] In their reply, the applicants allege further that Ms Zurnamer was intimidated as she was the only woman at an AGM and that the directors' offer to buy out the applicants' shares in 2013 was "*absurdly low*"⁶.

Issues to determine

[12] Having regard to the affidavits filed and the parties' written and oral submissions during the hearing, the issues between them may be distilled as follows:

- i. condonation for non-compliance with the Mangcu-Lockwood J order granted on 27 January 2025;
- ii. whether leave should be granted to the applicants for the admission of a supplementary replying affidavit deposed to by Ms Pienaar in August 2025⁷;
- iii. whether the applicant Trusts established their *locus standi* in relation to the application;
- iv. the merits of the application; and
- v. costs.

[13] Considering the key issues in dispute, the record and the parties' submissions, my view is that should the applicants fail to establish their *locus standi*, then such finding would signal the end of the application as it would be fatal to the applicants' case. In view of the conclusion I reach in this matter, the questions of condonation related to the January 2025 order, the application to admit the August 2025 supplementary replying affidavit and the Applicants' *locus standi*, are dealt with

⁶ Replying affidavit, par 24.6, p692

⁷ The application for leave to admit the June 2025 supplementary replying affidavit which deals with the estate agent's property valuation becomes academic in view of the finding on *locus standi*

first. A further dispute as to whether Ms Pienaar, the applicants' accountant and deponent to their affidavits, has personal knowledge of the facts alleged in the application, plays a secondary role and is not listed above.

Condonation for non-compliance with the 27 January 2025 order

[14] While there is no formal application for condonation, the applicants seek condonation in their replying affidavit for non-compliance with the Mangcu-Lockwood J Court order and agreed timeline for the delivery of the replying affidavit. Condonation was not opposed.

[15] In summary, the applicants' non-compliance with the order, and hence, delay in delivering the replying affidavit, are attributed to: the timeline falling within public holidays which made obtaining instructions challenging; the answering affidavit plus annexures totaled 300 pages and took some time to deal with; the applicants' attorneys were simultaneously involved in a complex trial in April – May 2025, and the applicants needed to engage the services of an estate agent to determine the market value of the Schoongezicht and de Hoop farms in order to properly respond to the respondents' averments.

[16] It is submitted that cumulatively, these factors prevented the timeous compliance with the order with the result that the replying affidavit was delivered late. The nature of the January 2025 order is procedural and time-related, rather than substantive, or one which potentially impacts the merits and disputes between the parties⁸. Heher JA in ***Uitenhage Transitional Local Council v South African Revenue Services***⁹ stated, with reference to the explanation for non-compliance and delay, that:

⁸ City of Cape Town v ICT Works Proprietary Limited [2023] ZAWCHC 86 par 40

⁹ 2004(1) SA 292 (SCA) par [6]- condonation related to the Supreme Court of Appeal Rules, though the principle is the same

“It must be obvious that if the non-compliance is time-related then the date, duration and extent of any obstacle on which reliance is placed must be spelled out.”

[17] In view of the SCA’s guideline related to a time delay, it must be realized that the delay in delivering the replying affidavit was only by 10 days, which by no means amounts to a lengthy period in the circumstances. Given the timeline referred to in the order, and having regard to the April-May 2025 calendar, it was most certainly the case that there were public holidays falling between 16 April and 16 May 2025¹⁰. Furthermore, the answering affidavit with annexures relied upon is certainly comprehensive, thus the explanation that time was needed to consider and obtain instructions, is reasonable.

[18] I also take no issue with the explanation that the applicants’ legal representative was engaged in a lengthy trial during the time that the replying affidavit was due to be delivered. While it is expected of parties and their legal representatives to comply with Court orders, the circumstances indicate that there was little or no prejudice to the respondents because of the delay and non-compliance with the Court order.

[19] As a result, I find the explanation provided by the applicants is in keeping with the sentiments expressed in the ***Uitenhage*** judgment (*supra*) and that it is sufficiently full and detailed to cover the period and timeline in question. Accordingly, the interests of justice dictates that I exercise my discretion in favour of granting condonation for non-compliance with the Mangcu-Lockwood J order. The replying affidavit is thus properly before the Court.

¹⁰ Agreed timetable for filing the answering and replying affidavits as per the order

Leave to admit the August 2025 supplementary replying affidavit

[20] The applicant Trusts seek leave by way of an application in terms of Rule 6(11) to admit into evidence the further supplementary affidavit of Ms Pienaar dated 7 August 2025. The application and affidavit were handed in during the hearing on 8 August 2025.

[21] It bears mentioning that in terms of Rule 6(5)(e), a Court has a discretion to allow the filing of further affidavits. In the exercise of such discretion, the main considerations are that the matter should be adjudicated upon all the facts relevant to the parties' disputes¹¹, that fairness should be the benchmark and that there is no prejudice to the opponent should the further affidavit be allowed¹².

[22] It is trite that the Court should exercise its discretion judiciously when deciding to allow a further affidavit. In my view, the admission of the August supplementary replying affidavit would not be prejudicial to the respondents. It seeks to address the point taken by the respondents that the applicants lack *locus standi* for the reasons advanced in the answering affidavit, which are dealt with in more detail below.

[23] Rather than refusing to admit the supplementary replying affidavit, the principle of fairness dictates that I allow the affidavit to be admitted so that the issue of *locus standi* of the applicants, which was fully ventilated during the hearing, may be considered. In the circumstances, the supplementary replying affidavit of Ms Pienaar, deposed to on 7 August 2025, is admitted as part of the application and there shall be no order as to costs.

The Resolutions signed by Trustees: the founding affidavit

¹¹ South Peninsula Municipality v Evans 2001 (1) SA 271 (C) 283 A-H

¹² Erasmus Superior Court Practice, D1-68, Service 9, 2019

[24] It is necessary to set out the relevant parts of the applicants' case related to *locus standi*. In the founding affidavit, Ms Pienaar states that the Trustees of the Derek Kelynack Family Trust are the 1st and 2nd applicants and the Trustee of the Jack Kelynack Family Trust is the 3rd applicant. They are collectively referred to as "the applicants." The applicants attach two Resolutions¹³ in support of Ms Pienaar's averment that she acts under authority of Trust Resolutions from the applicants and that the respective Trustees resolved to institute the application.

[25] The two Resolutions, set out in **JP1**, read as follows:

'JP1'

RESOLUTION

of the Trustees of the

THE DEREK KELYNACK FAMILY TRUST

T[...]

IT IS RESOLVED AND AGREED AS FOLLOWS:

1. *That the Trust pursues its rights as shareholder of JA Clift (Pty) Ltd.*
2. *That Francois Pienaar Attorneys Inc. trading as FDP Law are appointed for these purposes.*
3. *The Jeanne Gallaway Pienaar is authorized to represent the Trust in these efforts, including to negotiate and sign a Contingency Fee Agreement with FDP Law, and to sign whatever documentation may be required including Court Affidavits.*

¹³ JP1

DATED at Melkbosstrand on 28 May 2024.

(SGD) MARION CORNELIA KELYNACK: TRUSTEE

(SGD) TRACEY SUSAN ZURNAMER: TRUSTEE

and

RESOLUTION

*of the sole existing Trustee of the
THE JACK KELYNACK FAMILY TRUST
T[...]²*

IT IS RESOLVED AND AGREED AS FOLLOWS:

1. *That the Trust pursues its rights as shareholder of JA Clift (Pty) Ltd.*
2. *That Francois Pienaar Attorneys Inc. trading as FDP Law are appointed for these purposes.*
3. *The Jeanne Gallaway Pienaar is authorized to represent the Trust in these efforts, including to negotiate and sign a Contingency Fee Agreement with FDP Law, and to sign whatever documentation may be required including Court Affidavits.*

DATED at Melkbosstrand on 28 May 2024.

(SGD) PATRICIA MERLE RIX: TRUSTEE

[26] *Ex facie* JP1, Ms Zurnamer N. O. and Ms Kelynack N. O. signed the Resolution related to the Derek Kelynack Family Trust while Ms Rix N.O. signed as the sole existing Trustee of the Jack Kelynack Family Trust. Significantly, the applicants attach no other documents to the founding affidavit related to the authorization of trustees and the capacities of the two Family Trusts, for example, Letters of Authority from the Master of the High Court and/or the Master's Certificate and copies of the Trust Deeds in respect of these two Family Trusts.

The respondents' lack of *locus standi* point

[27] The respondents make the averment in paragraphs 111 and 112 of their answering affidavit that Ms Pienaar does not confirm whether the Trusts were quorate. They allege that the applicants failed to establish *locus standi* on the affidavits and specifically refer to Ms Rix N.O., who indicated in the Resolution that she was the sole existing Trustee of the Jack Kelynack Family Trust.

The applicants' response

[28] Given the respondents' stance in the answering affidavit that the founding affidavit is silent on whether the Trusts were quorate¹⁴ and their denial that the applicants have established *locus standi* to litigate the matter, one must consider the applicants' reply thereto. In paragraph 50 of the replying affidavit, Ms Pienaar states as follows:

"50. Ad paragraphs 111 and 112

¹⁴ See below

This submission carries no validity in law, and in any event it is denied that there has been any non-compliance with the Trust Deeds and the Applicants' Trusts have locus standi.¹⁵"

[29] There are no documents attached to the replying affidavit which relate to the issue of the applicants' *locus standi*. As indicated earlier, it is the second supplementary replying affidavit which attempts to address the lack of *locus standi* objection in more detail.

[30] Ms Pienaar's supplementary replying affidavit states that after the institution of the application, Letters of Authority were collected from the Master's office in terms of which additional Trustees were appointed for the Jack Kelynack Family Trust. The updated Letters of Authority issued by the Master's office and dated 22 November 2024 are annexed to her affidavit¹⁶ wherein the Assistant Master certifies that Patricia Merle Rix, Tracey Susan Zurnamer and Jeanne Gallaway Pienaar are authorised to act as Trustees of the Jack Kelynack Family Trust. The Letters of Authority are signed by the Assistant Master.

[31] Furthermore, the applicants attach annexure SA2 to the supplementary replying affidavit, a Resolution of Trustees which reads as follows:

'SA2'

RESOLUTION

of the Trustees of

THE JACK KELYNACK FAMILY TRUST

I/[...].

¹⁵ Replying affidavit, p275

¹⁶ SA 1

IT IS RESOLVED THAT

1. *The Trust's participation as Third Applicant in the matter of Tracey Susan Zurnamer N. O. and Others versus JA Clift (Pty) Ltd and Others case number 25519/24, is hereby ratified.*
2. *That Jeanne Galloway Pienaar is authorised to represent the Trust in introducing this Resolution to the court proceedings, and to sign an affidavit on behalf of the Trust.*

Dated at Pinelands on 6 August 2025.

(SGD) PATRICIA MERLE RIX: TRUSTEE

(SGD) TRACEY SUSAN ZURNAMER: TRUSTEE

(SGD) JEANNE GALLOWAY PIENAAR: TRUSTEE

[32] The third annexure to the supplementary replying affidavit is the Master's certificate dated 9 September 2011 in respect of the Jack Kelynack Family Trust which indicates that Mandy Hamilton Dix-Peek resigned as Trustee and that Ms Rix and Phillip Keith Kelynack would continue as Trustees of that Trust. The final annexure is a copy of the Jack Kelynack Family Trust Deed¹⁷.

The parties' submissions

¹⁷ SA 3

[33] Having set out the framework of *the locus standi* issue on the papers, I turn to the parties' main submissions in respect of *locus standi*. According to counsel¹⁸ for the respondents, the issue related to *locus standi* has nothing to do with a lack of authority, but everything to do with a lack of capacity of both applicant Trusts. The submission is that the respondents' denial of *locus standi* followed a consideration of the founding affidavit, which contained limited or no information. In respect of the Resolution of the existing Trustee of the Jack Kelynack Family Trust, Ms Rix N.O., the submission is that she did not purport to act as agent of the other Trustees.

[34] It was further submitted that the Letters of Authority in relation to the Jack Kelynack Family Trust¹⁹ cannot ratify that Trust's participation as the 3rd applicant. In support of these submissions, the respondents' counsel referred to the Trust Deed which states that the number of Trustees shall not fall below two²⁰ and argued that the 3rd applicant failed to produce evidence that there were two Trustees of the Jack Kelynack Family Trust at the relevant time.

[35] The respondents submit further that the ratification as contained in the Resolution (SA2)²¹ was a nullity and that the additional attachments to the supplementary replying affidavit do not assist the 3rd applicant. In this regard the respondents rely on the Supreme Court of Appeal (SCA) judgment in ***Land and Agricultural Bank of South Africa v Parker and Others***²² and a judgment of this Division, ***Meijer NO and Another v Firstrand Bank Ltd (formerly known as First National Bank of Southern Africa) and Another, in re: Firstrand Bank Ltd and Another v Meijer and Others***²³. The respondents are of the view that the judgments of ***Desai-Chilwan NO v Ross and Another***²⁴ and ***Baeck & Co SA (Pty) Ltd v Van***

¹⁸ Adv P MacKenzie made submissions on *locus standi* and Adv G Woodland SC argued the merits. The written heads of argument bear both counsels' names.

¹⁹ SA1

²⁰ My reference

²¹ SA2

²² 2005(2) SA 77 (SCA) para [11]

²³ [2012] ZAWCHC 23

²⁴ 2003(2) SA 644 CPD

Zummeren and Another²⁵, do not assist the applicants, particularly the third applicant.

[36] As far as the Derek Kelynack Family Trust is concerned, the respondents argue that the Resolution to the founding affidavit does not assist to establish *locus standi* as there is no Trust Deed nor other documents attached and no evidence was presented that the Trust was a properly constituted entity or had capacity. In addition, it was submitted that the applicants' reliance on Rule 7 does not assist them as the issue is not about authority to act, but the capacity of the Trust at the time of institution of the application. Accordingly, the respondents seek a dismissal of the application on the grounds that the applicant Trusts have failed to establish *locus standi*.

[37] Counsel for the applicants disagreed with her opponent and submitted that in respect of the Jack Kelynack Family Trust, the Trust was quorate at the time of instituting the proceedings. She substantiates this view with reference to the Resolution attached to the supplementary replying affidavit. In this regard, the applicants rely on the **Baeck** judgment to support their viewpoint.

[38] In respect of the Derek Kelynack Family Trust, it is admitted that no Letters of Authority nor Trust Deed are attached to the founding affidavit. In summary, the applicants contend that the *locus standi* of the applicant Trusts has been established and that all the Trustees of the various Trusts know each other. The further submission is that the respondents should have utilized Rule 7 in circumstances where they questioned the authority of the Trustees.

The Trusts' *locus standi*: legal principles, discussion and findings

²⁵ 1982(2) WLD 112

[39] **LAWSA's** description of *locus standi* or legal standing is that it is not merely a procedural question but also a question of substance and that "*it concerns the sufficiency and directness of a litigant's interest in proceedings which warrants his or her title to prosecute the claim asserted*"²⁶. Similarly, **Amler's Pleadings**²⁷ confirms the above definition in LAWSA and adds that *locus standi* also relates to the capacity of a person to conclude a jural act.

[40] The general rule is that the party who/which institutes the proceedings must allege and prove its *locus standi*²⁸ and furthermore, that the party's legal standing must appear *ex facie* the founding affidavit/pleading. In **Trustees for the time being of the Legacy Body Corporate v BAE Estates & Escapes (Pty) Ltd**²⁹, the SCA held that a lack of *locus standi* point should be raised pertinently in the answering affidavit for the other party to address it.

[41] Having regard to the affidavits, it is safe to state that the respondents comply with the **BAE Estates** view as they raised the lack of *locus standi* point clearly and pertinently in their answering affidavit. From the above principles, it thus follows that the applicants, as the parties instituting the application, are required to allege and prove their *locus standi* on behalf of the Trusts, and that such legal standing must appear *ex facie* the founding affidavit.

[42] Insofar as Trusts are concerned, the first point to make is that a Trust is not a legal *persona*, but a legal institution *siu generis*³⁰. The Trust assets and liabilities vest in the Trustees who own the Trust property for the benefit of the beneficiaries. The

²⁶ LAWSA Third Edition (4), par 70, p66

²⁷ Tenth Edition, LTC Harms and MR Townsend, p250-251

²⁸ *Kommissaris van Binnelandse Inkomste v Van der Heever* 1999(3) SA 1051 (SCA) par [10] *Mars Incorporated v Candy World (Pty) Ltd* 1991(1) SA 567 (A) at p575; *Four Wheel Drive Accessory Distributors CC v Rattan No* 2019(3) SA 451 (SCA) par [7]

²⁹ 2022 (1) SA 424 (SCA) para [35]

³⁰ *Theron N.O and Another v Loubser NO and Others, In re: Theron N.O and Another v Loubser and Others* 2014(3) SA 323 (SCA) par [5].

Trustees are cited in their *nomine officio* capacities, as the Trusts, absent a legal *persona*, cannot be cited as a litigant in legal proceedings.

[43] On the citation of the parties, the respondents take issue that the citation of the applicants is incorrect. I disagree with this view for the very reason that a Trust is not a legal *persona* and hence, its Trustees bring and defend litigation on its behalf, thus it is the Trustees who are cited on the issued process.³¹ Thus, I am satisfied that *ex facie* the application, the Derek and Jack Kelynack Family Trusts, as 1st to 3rd applicants, are correctly cited with reference to the names of Trustees in their *nomine officio* capacities.

[44] At this juncture, I also stress that one should distinguish whether the proceedings/application relate to the two Family Trusts or not. The distinction is material because where litigation relates to the Trust(s) and/or Trust affairs, such proceedings should be instituted by the Trustees in their capacities as such³².

[45] To be clear, while relief in this matter is based upon section 163 of the Companies Act and several orders are sought pursuant to such case, it is common cause that the shareholding in the company is held by the various Trusts, as I set out above in the judgment. Furthermore, the Resolutions upon which the applicants rely indicate that the Trusts instituted the application to enforce their rights as shareholders in the company, an aspect which is also not disputed. In view of these factors, it follows therefore that the merits of the application involve the various Trusts as shareholders of the company (to varying degrees) and that the Trustees are the correct persons to litigate on behalf of the Family Trusts.

[46] Turning then to the most crucial aspect of the lack of *locus standi* enquiry: the capacity of the applicant Trusts. Ordinarily the Trustees' powers are contained in the

³¹ Honore's South African Law of Trusts, Fifth Edition, p419; Desai-Chilwan *supra*, para [27]-[28]

³² Honore's South African Law of Trusts *supra*, p419

relevant Trust Deed³³. To illustrate the significance of a Trust Deed, I refer to **Parker (supra)**³⁴, wherein Cameron JA³⁵ described a Trust Deed as the “*trust’s constitutive charter*”. Furthermore, Trustees must act jointly unless there is authorization in the Trust Deed which allows a Trustee to act alone³⁶.

[47] Importantly, Cameron JA also stated that:

*“[11] It follows that a provision requiring that a specified minimum number of trustees must hold office is a capacity–defining condition. It lays down a prerequisite that must be fulfilled before the trust estate can be bound. When fewer trustees than the number specified are in office, the trust suffers from an incapacity that precludes action on its behalf.”*³⁷

[48] The principles laid down in **Parker** are relevant to the *locus standi* issue in this matter. Where the Trust Deed requires a minimum number of Trustees in office at the time an action or decision is taken by them on behalf of the Trust, then in circumstances where the minimum threshold is not met, it invariably means that the Trust would lack capacity to take such action. In respect of the Jack Kelynack Family Trust, the significant times are the first Resolution in May 2024 and at the institution of the application. The question thus arises whether the two Trusts met the minimum number of Trustees’ requirements at the time it acted. This goes to the heart of the Trusts’ legal standing to institute the application.

³³ Burger NO and Others v Bester NO and Others 2024(1) BCLR 1 (CC) para [37]

³⁴ Supra, par [10]

³⁵ As he was

³⁶ Parker, para [9] – [10]; see also the recent judgment of the Constitutional Court in Shepstone and Wylie Attorneys v De Witt N.O. and Others 2026 (1) SA 349 (CC) para [58] and the distinction between unanimous-decision Trusts and majority-decision Trusts (which is not an issue in this matter)

³⁷ Parker, para [11]

[49] I pause to emphasise that a litigant's *locus standi* must appear *ex facie* its founding papers, thus in my view, the following essential averments or allegations are necessary in respect of *locus standi* in relation to the Trusts:

- i. that the Trustees have the necessary capacity to act on behalf of the Trust by virtue of their appointment in terms of Letters of Authority, a Court order, or, the Master's Certificate (copies should be attached to the founding affidavit)³⁸; and
- ii. that at the time of acting in respect of Trust matters (whether transacting or instituting legal proceedings), the number of Trustees in office, met the minimum threshold requirement of the Trust Deed³⁹.

[50] Any additional allegations would be secondary or may be considered as not determinative of the Trusts' legal standing *ex facie* the founding affidavit. Counsel for the respondents submitted that the two Trusts were not quorate at the time the application was instituted. "*Quorate*" means "*having a sufficient number of officers or members present to transact business*".⁴⁰ As alluded to earlier, if the number of Trustees fell below the minimum threshold provided for in the Trust Deed at the time of taking an action on behalf of the Trust, then the Trust would not be quorate as, according to **Parker**⁴¹, it lacked capacity for a decision to be taken on its behalf. This lack of capacity is fatal to the question of *locus standi* and has nothing to do with the lack of authority of the Trustees.

The Derek Kelynack Family Trust

[51] The Trustees of the Derek Kelynack Family Trust allege in their confirmatory affidavits that they are the Trustees of such Trust but fail to state that they were

³⁸ See Honore, p419

³⁹ My view is that a copy of the Trust Deed should be attached to the founding affidavit

⁴⁰ See "Quorate", definition and meaning, <https://www.merriam-webster.com>

⁴¹ Supra, par [11]

properly appointed by Letters of Authority and/or Trust Deed or any other given instrument. Secondly, and having regard to the discussion on the legal principles and requirements related to the Trust's capacity, it was required of such Trust to indicate in its founding affidavit that it had *locus standi* to litigate against the respondents or at least, to institute the application. However, the founding affidavit is silent on this averment and merely refers to the Trust's name, identifies the Trustees and mentions that Ms Pienaar is authorized to depose to the affidavit. Having regard to the legal principles discussed above, I am of the view that these averments are insufficient to establish *locus standi ex facie* the founding affidavit.

[52] Furthermore, the Resolution signed by Ms Kelynack N.O. and Ms Zurnamer N.O. in May 2024 does not assist the Trust because it simply indicates that it was resolved by these Trustees that Ms Pienaar was authorized to depose to an affidavit and enter a fee arrangement, and that the Trust was pursuing its rights as shareholder of the company. The Resolution is, in my view, irrelevant when considered against the requirements set out in **Parker** that the Trust Deed is the "*constitutive charter*" of the Trust, which indicates the required quorum for decision-making by Trustees on behalf of the Trust.

[53] Added to this, there is also no reference in the founding affidavit to the Trust Deed nor any other documents submitted by way of a supplementary replying affidavit, nor any averments which indicate the minimum required number of Trustees in office. Having regard to all these factors, I simply have no idea what the required minimum was, whether the Trust was quorate in May 2024 when it was resolved to institute the application and when the application was instituted in November 2024, and whether the Trustees had the necessary capacity to act on behalf of the Trust.

[54] These failures are fatal, with the result that I find that the 1st and 2nd applicants have failed to allege and prove the *locus standi* of the Derek Kelynack Family Trust in respect of the application. As a result, the point taken by the

respondents that such Trust has failed to establish and prove its *locus standi*, succeeds with the result that the application in relation to the 1st and 2nd applicants falls to be dismissed.

The Jack Kelynack Family Trust

[55] In respect of the Jack Kelynack Family Trust, the situation is slightly different. Here, the documents *ex facie* the founding affidavit are a Resolution signed on 28 May 2024 by Ms Rix N.O. as sole existing Trustee, similarly resolving to authorize Ms Pienaar to pursue the Trust's rights as shareholder in the company. The additional documents attached to the supplementary replying affidavit, sought to meet the no *locus standi* point raised by the respondents, are: (i) a new Resolution signed by Ms Rix, Ms Zurnamer and Ms Pienaar N.N.O on 6 August 2025 resolving to ratify the Trust's participation in this matter and authorizing Ms Pienaar to represent the Trust and sign affidavits; (ii) the Master's certificate dated 9 September 2011 indicating the resignation of a Trustee but that two Trustees (Ms Rix and Mr Kelynack N.N.O) remain, and (iii) the Trust Deed signed by four Trustees on 17 June 1994.

[56] The question to answer is whether the averments in the 3rd applicant's affidavits plus the documentary evidence, allege and prove the Trust's *locus standi*? There is no averment that the Jack Kelynack Family Trust was quorate at the time Ms Rix N.O. resolved in May 2024 that proceedings should be instituted against the respondents nor a similar averment related to the institution of the application in November 2024. Having regard to clause 5.3 of the Trust Deed, the requirement for a quorum is a minimum of two Trustees at the time of performance of an action on behalf of the Trust.⁴²

[57] Having regard to the founding affidavit, the Trust Deed, the Resolution and citation of Ms Rix N.O., I conclude that at the time of resolving to institute

⁴² See Parker *supra*, para [9] – [11]

proceedings in May 2024, the number of Trustees fell below two, meaning that the Trust lacked capacity. According to **Parker**, in those circumstances, any action taken/made on behalf of the Trust was precluded. In addition, clause 5.3.1 of the Trust Deed prescribes that where the number falls below the minimum of two Trustees, the sole Trustee retains power to appoint an additional Trustee to increase the number to meet the threshold. In this regard, there is no evidence that Ms Rix N.O., who is described as the sole existing Trustee in the May 2024 Resolution, acted in accordance with her duty in clause 5.3.1. In addition, there is no evidence that Ms Rix N.O. acted as agent on behalf of a co-Trustee and she clearly failed to comply with clause 14.2 of the Trust Deed which required the Resolution to be signed by all the Trustees.

[58] Thus, in respect of the action taken by Ms Rix N.O. – the Resolution to institute the application – my finding is that the Trust Deed’s requirement in clause 5 was not fulfilled, which led to the Trust suffering an incapacity which precluded action on its behalf. These findings should be the end of the matter for the Jack Kelynack Trust except that the supplementary replying affidavit then attempts to salvage the situation by introducing Letters of Authority and a second Resolution, SA2, as indicated above.

[59] The Letters of Authority, SA1, purport to authorize Ms Rix N.O., Ms Zurnamer N.O and Ms Pienaar N.O, as Trustees and is dated 22 November 2024, about five days prior to the launch of this application. Ms Pienaar explains as follows in paragraphs 3 to 5 of her supplementary replying affidavit:

‘3. Subsequent to the institution of these proceedings, Letters of Authority were collected from the Master of the High Court in terms of which new trustees were appointed for the Jack Kelynack Family Trust (I[...]). The updated Letters of Authority dated 22 November 2024 are annexed marked “**SA1**”.

4. *I annex hereto marked “SA2” a Resolution of the Trustees of the Jack Kelynack Family Trust, ratifying the actions taken by the Third Applicant in these proceedings to date.*
5. *Furthermore, for the sake of completeness I annex a copy of the Trust Deed for this Trust marked “SA3”.*

[60] From the above, I conclude that on 22 November 2024 and by virtue of these Letters of Authority⁴³, there were three Trustees in office. The Letters of Authority were only collected after the institution of proceedings, but nothing much turns on this fact. The Trust relies on the second Resolution, dated two days before the hearing and some 9 months after the institution of the application, to allege that the three Trustees resolved to ratify the Trust’s participation in the proceedings.

[61] From the evidence presented by the 3rd applicant, and in view of my earlier findings regarding the May 2024 Resolution and the Trust’s lack of capacity, it must be recalled that the Trust suffered from a lack of capacity in May 2024. This brings me to whether the three Trustees were entitled in August 2025, to ratify the Trust’s participation in the proceedings and thus, Ms Rix N.O.’s action in May 2024 resolving to institute the application.

[62] In *Hyde Construction v Deuchar Family Trust*⁴⁴, Rogers J (Traverso DJP and Bozalek J concurring) had an opportunity to consider the question of ratification in relation to the actions of a Trustee. Briefly, the issue before the Court *a quo* was whether the Trust was properly before the Court. In the founding papers, Mr Deuchar, Trustee, alleged that he and his wife were the only Trustees and they had resolved to bring a particular application, the detail of which is not relevant in this

⁴³ SA1

⁴⁴ 2015(5) SA 388 (WCC) para [31] – [42]

matter. It subsequently came to light that this was incorrect and that his children were co-Trustees. It was alleged in a supplementary replying affidavit that by virtue of a Resolution, all the Trustees had ratified the institution of the proceedings.

[63] The Court *a quo* in **Hyde Construction** held that the Trust was properly before the Court, on the basis that any deficiency in authority was cured by subsequent ratification. Rogers J distinguished between a lack of authority, as was the case in the appeal, and a lack of capacity of the Trust, as discussed in **Parker**. Whilst a lack of authority of a Trustee may be ratified, it was held that a lack of capacity as where the Trust Deed required a minimum number of Trustees in office, and where at the time of an action, that number fell below the minimum, the act would be a nullity and not capable of ratification⁴⁵.

[64] Rogers J in **Hyde Construction**⁴⁶ makes it clear that in principle, there is no reason why a decision taken in the Trust's name by (for example) two of four Trustees should not subsequently be ratified by a full complement of Trustees. I align myself with the learned Judge's view and finding on ratification in the case of a decision taken where there was a deficiency in authority.

[65] The problem for the third applicant, however, is that this matter does not revolve around a lack of authority issue. Clause 5.3 of the Trust Deed is, to use Cameron JA's words in **Parker**⁴⁷, a "*capacity-defining condition*" which is a requirement before the Trust can be bound. The action taken by Ms Rix N.O. in May 2024, on behalf of the Trust, was a nullity. Thus, the reliance on **Baeck & Co. SA (Pty) Ltd v Van Zummeren and Another**⁴⁸ which held that the absence of authority can be ratified, is misplaced.

⁴⁵ Hyde Construction, supra, p388

⁴⁶ Supra, par [32]

⁴⁷ Supra, par [11]

⁴⁸ 1982(2) SA 112 (W) at 119 C-D – the matter dealt with ratification of an unauthorised act by a company

[66] The Master's certificate of September 2011, SA3, indicates that one trustee had resigned and two remained, one of whom was Ms Rix N.O. At the time of institution of the application on 27 November 2024, it is anyone's guess as to the total complement of Trustees in office and the fact that Letters of Authority dated 22 November 2024 indicates that there were three Trustees appointed, does not assist the 3rd applicant because no new Resolution was taken by at least two Trustees prior to the institution of the action in late November 2024.

[67] Where a new Resolution was taken by two or three Trustees prior to the institution of the application, my view is that the Trust would have had the necessary capacity and the issue of *locus standi* would not have arisen. However, this was not the case.

[68] The very late second Resolution, dated 6 August 2025, many months after the institution of the application, which seeks to ratify the Trust's involvement in the application, also does not assist the 3rd applicant for the reason that the initial action/decision/Resolution to institute the action, was a nullity due to the Trust suffering from an incapacity which precluded an action on its behalf. In view of ***Parker, Hyde Construction, Meijer N. O.***⁴⁹, such nullity cannot be ratified.

[69] In view of the above findings, I thus conclude that the 3rd applicant has failed to establish and prove its *locus standi*, and in such circumstances, the application shall be dismissed.

Remaining aspects

[70] The argument regarding Rule 7 does not take the matter further nor save the applicants from the lack of capacity/*locus standi* findings. In as much as the

⁴⁹ Supra, pars [18]-[21]

applicants argued that the respondents also failed to provide copies of Trust Deeds and letters of Authority, which may be the case, the applicants elected to institute the application and were *dominus litis* and thus, any failures on the respondents' side do not cure the insurmountable problem of a lack of *locus standi* of the applicants. In such circumstances, the application shall be dismissed and I thus do not consider the merits of the section 163 dispute. Furthermore, it would be purely academic to grant leave to admit the first supplementary replying affidavit (which deals with the estate agent valuation) considering the finding regarding *locus standi*.

[71] On the issue of costs, while the respondents requested a punitive costs order, I am not so inclined to grant an attorney and client costs order. The reason being that it would, likely, involve a consideration and findings as to whether the applicants' abused the process, whether a material dispute of fact exists, and the merits. As indicated, no finding is made on the merits and related issues, and thus the usual order will follow, and costs on scale C is warranted as the issue of lack of capacity of the Trusts was not straightforward. The issue involved considerable research and consideration of additional authorities.

Order

[72] In the result, the following order is granted:

- a. Condonation is granted for the applicants' non-compliance with the order granted on 27 January 2025.
- b. Leave is granted for the admission of the supplementary replying affidavit dated 7 August 2025. No order as to costs.

- c. The application is dismissed with costs, which shall include the costs of two counsel (scale C).

M PANGARKER

JUDGE OF THE HIGH COURT

Appearances:

For Applicants: Adv A Janssen

Instructed by: Francois Pienaar Attorneys
t/a FDP Law
CAPE TOWN

For Respondents: Adv GW Woodland SC
Adv P MacKenzie

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